Public Prosecution v Dulamit bin Sulaiman & Anor

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–117 OF 2004
NALLINI PATHMANATHAN JC
11 JULY 2008

Criminal Law — Murder — Causation — Culpable homicide or murder — Whether prosecution proven both accused inflicted bodily injury sufficient in ordinary course of nature to cause death — Whether common intention established — Whether acts of two accused to be considered separately — Penal Code ss 34, 302, 304, 325

Criminal Procedure — Factors determining severity of sentence — Public interest — Other factors in determining appropriate sentence

Evidence — Admissions — Whether evidence in affidavit admissible if deponent not present for cross-examination — Admissibility of post-mortem report — Weight to be assigned to report when pathologist refused to testify — Whether report could be admitted in evidence when pathologist who made report could not be procured — Whether report ought to be treated with caution — Criminal Procedure Code s 340

On 29 July 2004, the first accused and one Jassrine bin Sungin ('Jassrine'), a close friend of the first accused went out for a meal. According to Jassrine, the main eye witness of the crime, both he and the first accused consumed many bottles of beer and stout together with their meal. The two men later met up with the second accused and another friend and continued drinking beer and stout. As they were drinking, one Lim Chin Kok, the deceased, approached them and tried to pressure them into buying some CDs he was selling but all four men refused. When the four men continued to refuse to buy the CDs the deceased became angry and shouted profanities at them and left. The four men then continued drinking liquor until the restaurant was about to close and made their way to the first accused's room, which was in a shophouse nearby. As they made their way to the first accused's room they found that the deceased had followed them. The deceased then allegedly asked them for some money and when the first accused replied they did not have any, the deceased started abusing them verbally. Thereafter, when the four males started walking up the stairs towards the first accused's room the deceased

threw a bottle of liquor upwards in the direction of the four men. The four then descended and confronted the deceased and a fight broke out between the first accused and the deceased in the Goodwell Restaurant ('the restaurant'). Initially both the first accused and the deceased allegedly used their fists as neither of them was armed. However, later the second accused was observed to have joined in the fray to help the first accused. The second accused allegedly hit the deceased with a plastic chair which caused him to fall to the ground in a sitting position. Then finally the first accused took hold of a flower pot and hurled it at the deceased's head. At this point the deceased collapsed face downwards onto the ground into the position he was subsequently found in. The son of the proprietor of the restaurant, one Ho Kin Hung ('Ho') the other eyewitness to the crime, called the police. His evidence was quite similar to the evidence of Jassrine. The police who came onto the scene five minutes later arrested the two accused. The investigation officer who arrived at the scene confirmed that the deceased was lying face down in front of the restaurant and that remnants of a flower pot lay near the head of the deceased. The post-mortem report by Dr Virendra ('the pathologist') stated that the cause of death were the head injuries sustained by the deceased. However, the pathologist an Indian citizen who had left Malaysia to work in India refused to testify at the hearing and could not be procured at the trial of this matter. The two accused were jointly charged with the murder of the deceased under s 302 of the Penal Code ('the Code') read together with s 34 of the Code. The defence contended that the cause of death cited by the pathologist had to be treated with caution because the head injuries suffered by the deceased and which caused his death could have resulted from other causes, such as a fall. Further the defence contended that Jassrine's evidence differed from Ho, and that since there were material contradictions in the evidence there was no clear evidence whether it was the two accused or all four men who had beaten the deceased to his death. When the prosecution closed its case the court had to decide whether the prosecution had made out a prima facie case punishable under s 302 of the Code against the two accused and as to the weight to be accorded to the post-mortem report where the maker was not subject to cross-examination. The charge against the first accused was amended to the lesser offence of culpable homicide not amounting to murder under s 304 of the Code and the charge against the second accused was amended to committing grievous bodily harm by inflicting injury on the deceased under s 325 of the Code. The two accused pleaded guilty to the amended charges.

Held, convicting both the first accused and second accused and sentencing them to nine years and six years of imprisonment respectively:

(1) Although the pathologist could not be called as a witness the post-mortem report was admissible in evidence under s 340 of the

Criminal Procedure Code, as the pathologist who was the maker of the report was absent from the country. Section 340(1) makes lawful the admission of the report in relation to the appearance of the body as well as the cause of death. However, it is necessary to consider the weight to be accorded to it when the maker could not be subjected to cross-examination. The post-mortem report did not purport to surmise or attribute liability or culpability to any of the accused for the injuries suffered by the deceased. Instead the post-mortem report afforded an almost contemporaneous record of the injuries suffered by the deceased. According to the report the death was stated to have been caused by head injuries and his availability as a witness would not have altered his observations as noted in his report. As such the report by the pathologist, which contained a simultaneous record of his observations of the injuries suffered by the deceased could be used to conclude the fact that the deceased died as a result of the head injuries but his report had no bearing on whether the injuries were caused by the actions of the first or second accused (see paras 36, 38 & 39).

(2) Taken in toto, Jassrine's evidence was consistent. His evidence could be relied upon to ascertain the chronology of events that night. The direct evidence of Jassrine was corroborated, inter alia, by that of the chemist and the post-mortem report. The chemist testified that the deceased's blood was found on the first accused's underwear and slippers and this when considered in the context of Jassrine's evidence corroborated his version that the first accused and the deceased were involved in a fierce physical fight. The post-mortem report also corroborated that portion of Jassrine's evidence that related how the deceased was hit on the head by a flower pot hurled by the first accused (see paras 43–45).

(3) The contention by the accused that the cause of death cited by the pathologist had to be treated with caution, in his absence, lack basis because the deceased's head injuries could not have been caused by any other factors such as a fall. He did not fall from a great height for his death to have resulted. Besides the other corroborative evidence would lend weight to the contents of the post-mortem report (see para 48).

(4) On a consideration of the totality of the evidence there were no material contradictions in the evidence of the two eyewitnesses, Jassrine and Ho. Ho's evidence did not contradict Jassrine's evidence of a fierce physical fight between the first accused, the second accused and the deceased. In the face of the clear and detailed evidence of Jassrine as borne out by the chemist and the post-mortem report it could be concluded that the deceased's death was caused by the first accused and to a lesser extent the second accused. This was because the cause of death was the injury to the head whereas the second accused did not attack or hit the deceased on his head (see paras 51–52).

(5) After a consideration of the totality of the evidence in the instant case it was clear that there was no evidence to suggest the existence of any form of preconceived plan to act in concert to cause the deceased's death. The crucial factor is that such a plan must precede the act constituting the offence and in the instant case the fight that resulted between the two accused and the deceased was sudden and initiated by the deceased in the course of physical injuries exchanged between the two accused and the deceased separately. As such the acts of the two accused had to be considered separately (see paras 55 & 57).

(6) While it could be deduced from the first accused's conduct in continuing to hit the deceased that he intended to cause bodily injury to the deceased there was however no evidence to establish that the injury effected by the first accused, namely the injury to the deceased's head was sufficient in the ordinary course of nature to cause death. Usually the pathologist would assess whether the first accused's acts were sufficient to cause death but in the absence of such evidence it fell upon the court to look at the facts and the conduct of the first accused to ascertain his intention. The chronology of events and the evidence of the broken bottles and glasses utilised by each of them; and the first accused's act of picking up a flower pot weighing more than 28 pounds to hurl at the deceased showed that the injuries inflicted by the first accused would have caused the deceased's death. The facts also appeared to fall within the lesser offence of culpable homicide not amounting to murder within the first part of s 304 of the Code (see para 59).

(7) The intention or mens rea of the first accused also fell to be assessed on a consideration of the totality of the circumstances. Further the facts also showed that the second accused's part in the commission of the injury to the deceased was subsidiary to that of the first accused. The fact that the second accused used a plastic chair to hit the lower parts of the deceased and that he continued to hit the deceased despite the fact that the deceased was already badly injured showed that he intended to cause grievous bodily hurt to the deceased, which is culpable under s 325 of the Code (see para 60).

(8) In determining an appropriate sentence, the overriding principle was public interest. After considering the plea in mitigation and the repeated provocation by the deceased leading up to the fatal blow, it was found that the violent response of the second accused was not commensurate with the level of provocation afforded by the deceased (see paras 65–67).

(9) In the instant case, notwithstanding the level of provocation afforded by the deceased, the first accused reacted wholly disproportionately to the provocation received. His brutal and violent response of striking the deceased on the head with a heavy flower pot to the deceased's physical

and verbal abuse, was excessive. Therefore, the extent to which the provocation served to mitigate the first accused's conduct was limited. Notwithstanding the gravity of this offence, the fact that the first accused was a first time offender was a mitigating factor in the instant case. The first accused's decision to plead guilty to the alternative charge, which did not as of right automatically entitle a discount on the sentence to be imposed, and the fact that there was no premeditation to cause bodily injury were factors to be taken into consideration in determining the sentence (see paras 71–74).

[Bahasa Malaysia summary

Pada 29 Julai 2004, tertuduh pertama dan Jassrine bin Sungin ('Jassrine'), kawan baik tertuduh pertama keluar untuk makan. Menurut Jassrine, saksi utama dia dan tertuduh pertama telah minum berbotol-botol bir dan 'stout' sambil makan. Kedua-duanya kemudian bertemu dengan tertuduh kedua dan seorang teman yang lain dan minum bir dan 'stout' lagi. Ketika mereka sedang minum, Lim Chin Kok, si mati, menghampiri mereka dan cuba menjual CD-CD yang dijualnya tetapi mereka tak mahu membeli. Apabila keempat-empat mereka tetap tidak mahu membeli CD-CD tersebut, si mati menjadi marah dan menjerit kata-kata kesat kepada mereka lalu meninggalkan tempat tersebut. Keempat-empat mereka terus minum arak sehingga restoran itu hampir ditutup dan menuju ke arah bilik tertuduh pertama, di rumah kedai yang berhampiran. Dalam perjalanan ke bilik tertuduh pertama, mereka mendapati bahawa si mati mengekori mereka. Tertuduh kemudiannya didakwa meminta wang daripada mereka dan apabila tertuduh pertama berkata bahawa mereka tiada wang, si mati mencerca mereka. Kemudian, apabila keempat-empatnya menaiki tangga ke arah bilik tertuduh pertama, si mati melempar sebotol arak ke arah mereka. Mereka kemudiannya turun dan bersemuka dengan si mati dan satu pergaduhan berlaku antara tertuduh pertama dan si mati di Goodwell Restoran ('restoran tersebut'). Pada mulanya, tertuduh pertama dan si mati dikatakan menggunakan buku lima mereka kerana kedua mereka tidak bersenjata. Namun, kemudiannya tertuduh kedua didapati membantu tertuduh pertama dalam pergaduhan tersebut. Tertuduh kedua didakwa menghentak si mati dengan kerusi plastik yang mengakibatkannya jatuh terduduk. Dan akhirnya tertuduh pertama membaling pasu bunga ke arah kepala tertuduh. Anak lelaki pemilik restoran tersebut, Ho Kin Hung ('Ho'), seorang lagi saksi, menelefon polis. Keterangannya adalah sama dengan keterangan Jassrine. Polis yang datang ke tempat kejadian lima minit kemudian menahan kedua-dua tertuduh. Pegawai penyiasat yang tiba di tempat kejadian mengesahkan bahawa si mati terlantar secara meniarap di hadapan restoran dan saki baki pasu bunga bertaburan berhampiran kepala si mati. Laporan bedah siasat oleh Dr Virendra ('ahli patologi') menyatakan bahawa punca

kematian adalah kecederaan di kepala yang dialami oleh si mati. Tetapi, ahli patologi itu yang merupakan warganegara India telah meninggalkan Malaysia untuk bekerja di India enggan memberi keterangan semasa perbicaraan dan tidak dapat ditemui semasa perbicaraan. Kedua-dua tertuduh dituduh bersama atas kesalahan membunuh si mati di bawah s 302 Kanun Keseksaan ('Kanun tersebut') dibaca bersama s 34 Kanun tersebut. Pihak pembelaan menghujah bahawa punca kematian yang dinyatakan oleh ahli patologi hendaklah diterima pakai dengan berhati-hati kerana kecederaan di kepala si mati yang mengakibatkan kematiannya mungkin disebabkan oleh punca-punca lain, seperti kemungkinan terjatuh. Lagipun, pihak pembelaan menghujah bahawa keterangan Jassrine berbeza dengan keterangan Ho, dan oleh sebab keterangan-keterangan tersebut amat bercanggah secara material, tiada keterangan yang jelas yang menunjukkan bahawa kedua-dua tertuduh ataupun keempat-empat mereka yang memukul si mati hingga mati. Pada penutup kes pihak pendakwaan, mahkamah perlu memutuskan sama ada pihak pendakwaan berjaya membuktikan kes prima facie yang boleh dihukum di bawah s 302 Kanun tersebut terhadap kedua-dua tertuduh dan juga terhadap keutamaan yang harus diberikan terhadap laporan bedah siasat di mana pelapornya tidak boleh diperiksa balas. Pertuduhan terhadap tertuduh pertama dipinda kepada kesalahan yang lebih ringan iaitu homisid salah tak terjumlah membunuh di bawah s 304 Kanun dan pertuduhan terhadap tertuduh kedua dipinda kepada kemudaratan badan parah dengan mengakibatkan kecederaan kepada si mati di bawah s 325 Kanun. Kedua-dua tertuduh mengaku bersalah atas kedua-dua pertuduhan pindaan.

Diputuskan, mensabitkan tertuduh pertama dan kedua dan menghukum mereka masing-masing dengan sembilan tahun dan enam tahun penjara:

(1) Walaupun ahli patologi tidak boleh dipanggil sebagai saksi, laporan bedah siasat tersebut boleh diterima pakai sebagai keterangan di bawah s 340 Kanun Prosedur Jenayah ('KPJ'), kerana ahli patologi, yang merupakan pelapor laporan tersebut tiada di negara ini. Seksyen 340(1) KPJ menjadikan kebolehterimaan laporan tersebut yang berkaitan dengan keadaan mayat dan punca kematian sah. Tetapi, adalah perlu untuk menimbang keutamaan yang perlu diberikan ke atas laporan tersebut apabila pelapornya tidak dapat diperiksa balas. Laporan bedah siasat tersebut tidak bermaksud untuk menganggar atau meletakkan liabiliti atau kebersalahan ke atas mana-mana tertuduh atas kecederaan yang dialami si mati. Sebaliknya, laporan bedah siasat tersebut memberikan laporan yang hampir sewaktu dengan kecederaan yang dialami oleh si mati. Menurut laporan tersebut, kematian dinyatakan berpunca daripada kecederaan di kepala dan ketiadaan ahli patologi tersebut sebagai saksi tidak akan mengubah pemerhatiannya seperti yang telah dinyatakan di dalam laporannya. Oleh itu, laporan ahli

patologi, yang mengandungi laporan serentak berkenaan pemerhatiannya terhadap kecederaan yang dialami oleh si mati boleh digunakan untuk membuat kesimpulan bahawa si mati maut akibat daripada kecederaan di kepala tetapi laporannya tidak memberikan maklumat sama ada kecederaan tersebut berpunca daripada tindak tanduk tertuduh pertama atau kedua (lihat perenggan 36, 38 & 39).

(2) Secara keseluruhannya, keterangan Jassrine adalah konsisten. Keterangannya boleh diguna pakai untuk menentukan kronologi kejadian malam itu. Keterangan langsung Jassrine disokong, antara lain, oleh ahli kimia dan laporan bedah siasat. Ahli kimia memberikan keterangan bahawa darah si mati ditemui pada seluar dalam dan selipar tertuduh pertama dan ini apabila dilihat dalam konteks keterangan Jassrine menyokong versinya bahawa tertuduh pertama dan si mati terlibat dalam pergaduhan yang ganas. Laporan bedah siasat juga menyokong bahagian keterangan Jassrine berkaitan dengan bagaimana si mati dipukul di kepala dengan pasu bunga yang dilempar oleh tertuduh pertama (lihat perenggan 43–45).

(3) Hujah oleh kedua-dua tertuduh bahawa punca kematian yang dinyatakan oleh ahli patologi perlu diterima dengan berhati-hati kerana ketiadaan pelapor, tidak berasas kerana kecederaan di kepala si mati tidak boleh diakibatkan oleh faktor-faktor lain seperti dia mungkin terjatuh. Dia tidak jatuh dari tempat tinggi yang akan mengakibatkan kematiannya. Lagipun, keterangan sokongan yang lain akan menopang kandungan laporan bedah siasat tersebut (lihat perenggan 48).

(4) Melihat kepada keseluruhan keterangan, tiada percanggahan material antara keterangan kedua-dua saksi, Jassrine dan Ho. Keterangan Ho tidak bercanggah dengan keterangan Jassrine tentang pergaduhan ganas antara tertuduh pertama, kedua dan si mati. Melihat kepada keterangan Jassrine yang jelas dan terperinci seperti yang dinyatakan oleh ahli kimia dan laporan bedah siasat, boleh disimpulkan bahawa kematian si mati berpunca daripada tertuduh pertama dan pada kadar yang sedikit, berpunca daripada tertuduh kedua. Ini disebabkan punca kematian adalah kecederaan di kepala dan tertuduh kedua tidak menyerang atau memukul kepala si mati (lihat perenggan 51–52).

(5) Selepas pertimbangan keseluruhan keterangan kes ini, adalah jelas bahawa tiada bukti yang menunjukkan wujudnya perancangan untuk bertindak bersama-sama untuk mengakibatkan kematian si mati. Faktor penting ialah perancangan tersebut mestilah mendahului tindakan yang menjadi kesalahan tersebut namun dalam kes ini pergaduhan antara kedua-dua tertuduh dan si mati berlaku secara tiba-tiba dan dimulakan oleh si mati semasa pergelutan yang mengakibatkan kecederaan antara kedua-dua tertuduh dan si mati

secara berasingan. Oleh itu, tindakan kedua-dua tertuduh harus dipertimbangkan secara berasingan (lihat perenggan 55 & 57).

(6) Memandangkan ianya boleh disimpulkan daripada tindak tanduk tertuduh pertama apabila dia terus memukul si mati bahawa dia bermaksud untuk mencederakannya, tetapi tiada keterangan yang dapat membuktikan bahawa kecederaan yang diakibatkan oleh tertuduh pertama, iaitu kecederaan di kepala si mati adalah mencukupi dalam keadaan semulajadi mengakibatkan kematian. Biasanya ahli patologi akan menilai sama ada tindak tanduk tertuduh pertama cukup untuk mengakibatkan kematian tetapi dalam ketiadaan keterangan yang sedemikian, adalah menjadi tugas mahkamah untuk melihat fakta-fakta dan tindak tanduk tertuduh pertama untuk memastikan niatnya. Kronologi kejadian dan bukti botol-botol dan gelas-gelas yang pecah yang telah digunakan oleh setiap mereka; dan tindakan tertuduh pertama mengambil pasu bunga yang beratnya lebih daripada 28 paun dan membaling ke arah si mati menunjukkan kecederaan yang diakibatkan oleh tertuduh pertama akan menyebabkan kematian si mati. Fakta-fakta juga mencerminkan bahawa kesalahan tersebut adalah lebih ringan dan tertakluk di bawah homisid salah tak terjumlah kepada membunuh dalam bahagian pertama s 304 Kanun tersebut (lihat perenggan 59).

(7) Niat atau mens rea tertuduh pertama juga perlu diambilkira dalam keseluruhan keadaan. Malah, fakta-fakta juga menunjukkan bahawa tindak tanduk tertuduh kedua dalam mengakibatkan kecederaan kepada si mati adalah lebih ringan daripada tertuduh pertama. Fakta bahawa tertuduh kedua menggunakan kerusi plastik untuk memukul bahagian bawah badan si mati dan dia terus-terusan memukul si mati walaupun si mati telah cedera teruk menunjukkan bahawa dia berniat untuk mengakibatkan kecederaan parah terhadapnya, yang mana merupakan kesalahan di bawah s 325 Kanun (lihat perenggan 60).

(8) Dalam menentukan hukuman yang berpatutan, prinsipnya ialah kepentingan umum. Selepas mempertimbangkan rayuan peringanan hukuman dan juga bangkitan marah berkali-kali oleh si mati yang mengakibatkan pukulan maut tersebut, didapati bahawa tindakan ganas tertuduh kedua tidak sepadan dengan bangkitan kemarahan oleh si mati (lihat perenggan 65–67).

(9) Dalam kes ini, tanpa mengambilkira tahap bangkitan kemarahan oleh si mati, tertuduh pertama bertindak melampaui provokasi tersebut. Tindakannya memukul si mati dengan ganas dan kejam di kepala dengan pasu bunga yang berat sebagai membalas cercaan dan pukulannya, adalah berlebih-lebihan. Oleh itu, peringanan hukuman atas alasan provokasi bagi tertuduh pertama adalah terhad. Tanpa mengambilkira keseriusan kesalahan ini, fakta bahawa tertuduh

pertama merupakan pesalah kali pertama merupakan faktor peringanan dalam kes ini. Keputusan tertuduh pertama mengaku bersalah atas pertuduhan alternatif, tidak menjadikannya secara automatik berhak ke atas peringanan hukuman yang dikenakan, dan fakta bahawa tiada perancangan untuk mengakibatkan kecederaan merupakan faktor-faktor yang perlu diambilkira dalam penentuan hukuman (lihat perenggan 71–74).]

Notes

For a case on causation, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1155.

For a case on whether evidence in affidavit admissible if deponent not present for cross-examination, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 100.

For cases on factors determining severity of sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4244–4245.

Cases referred to

Namasiyiam & Ors v PP [1987] 2 MLJ 336, SC (refd)
Pendakwa Raya v Sangkaw a/l Ratnam [2007] 7 MLJ 353, HC (refd)
PP v Tegoh bin Aling [2008] 8 MLJ 705, HC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Criminal Procedure Code s 340, 340(1), (2)
Penal Code ss 34, 299, 300(1), (2), (3), (4), 300(c), 302, 304, 325

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Nallini Pathmanathan JC:

[1] Dulamit bin Sulaiman, the first accused ('Dulamit) and Valiuan bin Mantok, the second accused ('Valiuan') are jointly charged under s 302 of the Penal Code ('the Code') read in conjunction with s 34 of the Code with the murder of one Lim Chin Kok ('Lim') in the early hours of 30 July 2004 at about 2.30am. The charge against them, when translated, reads as follows:

> That you did jointly on 30 July 2004 at about 2.30am, in front of Restoran Goodwell, No 47, Jalan PU 2/1, Puchong Utama, Puchong, in the District of Petaling, Selangor, in furtherance of your common intention, murder and cause the death of Lim Chin Kok (NRIC No: 740308-08-5877) and as such, you have committed an offence that is punishable under s 302 of the Penal Code read in conjunction with s 34 of the Code.

[2] The prosecution called eighteen witnesses in support of its case. The salient facts that emerge from the testimony of these witnesses is outlined below.

SALIENT FACTS

[3] Jassrine bin Sungin, SP14 ('SP14'), who described himself as a close friend of the first accused, Dulamit, testified that on 29 July 2004 at about 8pm he went out for a meal with Dulamit. Both Dulamit and SP14 lived not far from each other in shophouses, ie in rooms above shops. SP14 explained that these rooms served as a form of 'hostel' for workers. SP14 testified that he was hired as a road maintenance worker.

[4] They went to a Chinese restaurant near their hostel where they had a meal and consumed some liquor, namely beer. SP14 estimated that they both consumed about 13 bottles of beer and stout during dinner. After meal, they purchased another six bottles of beer from the shop. They took the six bottles back to Dulamit's room at about 9pm and finished those bottles too. Having done so, they left Dulamit's room and went out in search of further drink at a different restaurant. They went to another restaurant situated near their hostel. It was now about 11.30pm. They ordered more beer and stout. At about 11.45pm they were joined by the second accused, Valiuan and another man whose name SP14 could not recall. Valiuan also ordered and consumed beer and stout. SP14 estimated that between the four of them they consumed about 19 bottles of beer and stout.

[5] As they were drinking, a man whom SP14 testified to be Chinese, approached them. The man had short hair and a wore long trousers and a jacket. This Chinese male was later identified by the police as the deceased, Lim Chin Kok ('Lim'). SP14 stated that he could smell beer emanating from him. Lim was selling video compact discs popularly referred to as CDs. SP14 recalled that when Lim first approached them, it was about 12am. He tried to coerce and pressure them into purchasing some CDs but all four men refused. Lim persisted, but the men, particularly Dulamit, steadfastly refused. Dulamit informed the vendor that they were not interested. The vendor then shouted some profanities at them and left. According to SP14, Valiuan commented that it was a good thing that they had not purchased anything from the vendor, as he looked like he could be a policeman given his stature and his short hair.

[6] The four men, including Dulamit and Valiuan then continued drinking until about 2am. By this time the restaurant was about to close. The four men purchased another five bottles of beer for further consumption in Dulamit's

room and left the restaurant. Dulamit's room was in a shophouse near the restaurant, and by SP14's estimation, would take approximately ten minutes on foot.

[7] They reached the shophouse where Dulamit lived just after 2am. As they were making their way to Dulamit's room, they noticed that the Chinese man, Lim, who had earlier tried to sell them CDs, had followed them. Lim asked the four men for some money. Dulamit informed Lim that they had utilised all their money. At this point Lim became angry and shouted profanities and started abusing them verbally. The four men simply ignored him and started making their way up the stairs towards Dulamit's room, which was on the second floor of the shophouse.

[8] Lim followed them up the stairs. He was carrying a glass bottle of stout. As Dulamit was in the midst of unlocking the door to his room on the second floor, Lim, who was on the landing between the first and second flight of stairs, threw the bottle he was holding at the four men. He threw the bottle upwards and forwards in the direction of the four men.

[9] The bottle struck Dulamit and slashed his forearm. SP14 described it as a 'large' wound which would require at least two stitches. At this point, Dulamit lost his temper. According to SP14 he said 'apa ini Cina, kurang ajar' which translates approximately to 'What's wrong with this Chinese man, he is rude'. In the meantime, Lim was continuing with his verbal abuse, utilising coarse and indecent language which he directed particularly at Dulamit. When he started making derogatory references to Dulamit's mother and directing his abuse at her, Dulamit ran down the stairs and chased after Lim. Lim ran down to the pavement in front of and adjoining the shophouse. Dulamit followed Lim onto the pavement. At the bottom of the shophouse where Dulamit lived was a 24 hour restaurant known as 'Restoran Goodwell'. A fight then broke out between Dulamit and Lim on the pavement immediately in front of Restoran Goodwell.

[10] As the fight started, SP14 stood at the bottom end of the stairs watching Dulamit and Lim. According to SP14, Valiuan stood next to him. The fourth male stood on the stairs behind SP14 and Valiuan.

[11] SP14 testified that initially both Lim and Dulamit used their fists. Neither of them was armed. Then Valiuan left SP14's side and joined in the fray to help Dulamit. He kicked Lim in the region of his shoulder. Lim fell to the ground. Valiuan then kicked his forearm. Lim however managed to stand upright again, and fight back. He kicked Valiuan and fought with him.

[12] At this point several men who were in the restaurant came over and

tried to calm matters. One of them said 'sudah, sudah' which translates to 'enough, enough'. However, the fight did not end there. Valiuan continued to hit Lim with a white plastic chair which he took from the restaurant. He hit Lim with the chair below the neck until the chair broke. Lim fell to the ground in a sitting position. Despite this, Lim continued to use foul language and abuse Dulamit, who was standing by. According to SP14, Lim used lewd and indecent language, again directing all this verbal abuse at Dulamit. Once again, Dulamit became angry and threw a glass which he had taken from the restaurant, at Lim. The glass did not hit Lim. Then Dulamit took hold of a flower pot positioned in the region of the restaurant. The pot comprised a green plant in a clay pot filled with earth. The investigating officer, one Assistant Superintendant Mohd Zaidi bin Mahmood, SP12 ('SP12') later stipulated the weight of such a pot as amounting to approximately 28kg.

[13] Dulamit held the plant end of the pot with both hands, and lifting the base of the pot off the ground, hurled the entire base end of the pot at Lim's head. The earth-filled pot struck Lim on the back of his head and neck. The pot fell and broke into pieces. After he had been hit with the flower pot, SP14 showed the court how Lim slumped onto his hands and knees, with his head hanging downwards. SP14 did not see him collapse face downwards onto the ground, as he was subsequently found. Then SP14, Dulamit, Valiuan and the fourth male all left and went up to Dulamit's room.

[14] While the fight between Lim and Valiuan and Dulamit was going on, SP14 himself became engaged in a verbal war of words with another Chinese male. SP14 maintained that although he was arguing with this other male, he was still able to witness the fight between Lim and Valiuan and Dulamit.

[15] On reaching Dulamit's room, his room-mate, Abdul Raimon @ Abdul Rahman bin Matsin, SP15 ('SP15') who had been asleep woke up and noticed that Dulamit's arm was bleeding. He insisted that the wound needed medical treatment. As they made their way back downstairs, they were all arrested by police officers and taken to a police station where they were remanded for questioning.

[16] The fight which had broken out at the Restoran Goodwell had also been witnessed by one Ho Kin Hung, SP1 ('SP1') who worked as a cashier in the restaurant. His father was the proprietor of the restaurant. SP1 testified that he was present in the restaurant when a fight broke out on the pavement area immediately in front of the restaurant. The fight was between a Chinese male and four other males, whom he described as 'orang Sabah'. SP1 said he described them thus, by reason of their facial features. During cross-examination however, he concurred that they could equally well be

from Sarawak. The four males were unknown to SP1, but he confirmed having seen the Chinese male, Lim, in the restaurant in the mornings, purchasing items.

[17] SP1 stated that in the early hours of the morning of 30 July 2008 there were about four or five customers of the restaurant present. All the customers sat outside the restaurant where plastic tables and chairs had been set out. No customers were inside the restaurant at the time of the incident. A television set had been installed outside and was playing at the time.

[18] The fight or brawl began between the deceased and the four males when the deceased threw a bottle of liquor upwards in the direction of some stairs. The four males were upstairs when the liquor bottle was thrown. They descended and the fight began. According to SP1, the four males hit the deceased with a bottle of liquor.

SP1, who was initially seated on a chair near where the fight had broken out, quickly moved further away from the scene of the fight. He stood and watched from this distance which he approximated to be about 1 metre. He maintained that there was sufficient light for him to view events clearly.

[19] According to him, the four males hit the deceased for ten minutes. The blows were directed to the head of the deceased. They, and it is not clear which one of the four, hit the deceased with a glass liquor bottle, which broke. According to SP1, the broken remains of the glass bottle were used to hit the deceased repeatedly. SP1 says he did not hear any shouts or calls for help from Lim. He saw that Lim was injured, and eventually Lim lay face down and prone on the ground. He did not move. After the fight, the four males ran to the upper floor of a shop adjacent to the restaurant. SP1 did not follow them and did not know where they went.

[20] While SP1 was watching the fight he used his handphone to call his father, Ho Yee Fui, and instructed him in turn to call the police. SP1 said that he did not go to Lim's aid during the fight, because he was frightened and did not want to get involved. After the fight had ceased, he went and stood next to the deceased. He described how Lim was lying prone and face down while his head was bleeding.

[21] The police arrived about five minutes after SP1 made the telephone call. Mohd Hairol Anuar bin Azman ('SP4') together with Constable Mohd Razi and Mohd Yasser were at the scene of the incident at 2.55am on 30 July 2008. On arrival SP4 testified that he found a Chinese male lying face down on the road in front of Restoran Goodwell. There was a considerable amount

of blood in the region of the man's head. He did not move. SP4 did not examine him to ascertain whether he was alive or dead. He suspected that the Chinese man was dead.

> At this point, SP1 introduced himself to SP4 and told him about the fight. He then led SP4 and his men to an area with some stairs and pointed out that this was where the four men had gone after the fight. The four men then descended the stairs and SP1 identified them as the men who were involved in the fight with Lim. SP4 and his men then detained and arrested the four men. SP4 noticed blood on one of them. The four men were subsequently identified as Dulamit, Valiuan, SP14 and SP15.

[22] After the arrest of Dulamit and Valiuan, SP4 stood guard over the scene of the incident, to ensure that nothing was removed or altered. Security tape was placed about 10–20 metres from where the deceased was lying. SP4 instructed one Abdul Halim bin Ahmad, SP11 to accompany him to SP14's home, which was nearby and procure SP14's national registration identity card. SP11 duly complied and when they got there, found another man in the room where SP14 lived. They looked for SP14's national registration card but failed to find it. They then arrested the man who was in the room, one Peter anak Chuang. SP17 ('SP17') and took him back to the scene of the incident where he was handed over to SP12, the investigating officer.

[23] SP12 arrived at the scene of the incident at about 3.40am and he confirmed that he saw a man whom he believed to be of Chinese descent lying face down in front of the Goodwell Restaurant, on the road. His head lay in the direction of the restaurant while his feet lay in the direction of the road. Apart from the deceased, SP12 described how fragments of broken glass and flower pots lay scattered around the region of the head of the deceased. There was also broken plastic chairs scattered in the area. There was a great deal of blood in the region of the head of the victim. SP4 then handed over the four suspects who had been arrested. Next, the forensic team arrived headed by Detective Superintendant Hamidon. The team collected numerous exhibits from the scene of the crime which were handed over to SP12 on completion. The items included:

(a) the broken fragments from a flower pot, stained with blood;

(b) fragments of broken glass;

(c) a sample of blood from Dulamit's finger on his right hand;

(d) Dulamit's singlet that was stained with blood;

(e) Dulamit's shorts/underpants;

(f) Dulamit's slippers that were blood-stained;

(g) SP14's blue sports shirt; and

(h) a flower pot weighing 28kg.

These items were collected and sent to the chemistry department for analysis. The forensic chemist duly produced a report and testified at the trial which is considered below.

[24] From the items found on the body of the deceased, they ascertained his identity as that of Lim Chin Kok (NRIC No 740308–08–5788). A post-mortem was carried out on the deceased by a forensic pathologist, one Dr Virendra Kumar in the presence of SP12 and a photographer, Sukjit Singh, SP3 ('SP3'). The deceased was also identified by his elder brother, one Lim Chiong Ming. The pathologist recorded his findings which are found in a post-mortem report.

THE CHEMIST'S EVIDENCE

[25] The forensic chemist, Bakhtiar bin Kassim, SP6 ('SP6') gave evidence of his analysis and findings undertaken in respect of several items which had been seized from the scene of the incident including items belonging to the deceased and the suspects. This was done by mapping out and analysing the DNA profiles from blood stains found on these items, against the DNA profiles of the deceased and the five suspects which were, in turn, mapped out from blood samples taken from them. SP6 testified that he found, inter alia, that:

(a) the DNA profile from the blood stains found on Dulamit's underpants/underwear matched that of the deceased; in other words, Lim's blood was found on Dulamit's underwear;

(b) Lim's DNA profile was also found on the glass fragments and broken pieces of a plastic chair. This shows that Lim was hit with glass objects and a plastic chair;

(c) the DNA profile procured from the blood on a cotton bud taken from Dulamit, Dulamit's singlet and his T-shirt all matched the DNA profile procured from his blood sample;

(d) the blood stains found on Dulamit's slippers showed a mixed DNA profile with contributions from Lim as well as Dulamit. In other words, Lim's blood was found on Dulamit's slippers; and

(e) no DNA profile could be procured from the blood stains on Lim's jacket, his jeans, shoes and the broken pieces of the flower pot.

[26] SP6 also explained the probability and accuracy of his findings in the context of the three major races in Malaysia, as follows: he estimated the

likelihood of another person of the Chinese race having the same DNA profile as Dulamit as being one in 115 quintillion, while the likelihood of another person of the Malay race having the same DNA profile as Dulamit as being one in 51 quintillion and one in 450 quintillion vis-a-vis an Indian. In short the likelihood of some other person's DNA profile being mistaken for Dulamit's DNA profile was virtually nil in the context of the three major races in Malaysia. SP6 also explained that he did not use the East Malaysian database because that base had only been built up to the extent of nine genetic loci, whereas 15 genetic loci were ideal to procure a good result. Hence the database of the three ethnic races in Malaysia were utilised.

THE POST-MORTEM REPORT (EXH P42)

[27] The pathologist in this case could not be called as a witness. The facts giving rise to this situation arose are that the pathologist, one Dr Virendra Kumar, an Indian citizen, worked, at the material time as a consultant pathologist under contract with the University Hospital, Kuala Lumpur. He had left Malaysia to work in India several years previously. Differences arose between him and the university in relation to the payment of certain allowances, which Dr Virendra declared were owed to him, and which the university denied. Dr Virendra therefore refused to testify notwithstanding that several attempts were made to ask him to do so. He insisted as a condition precedent to testifying that he be paid in full in respect of certain claims he had made against the University Hospital. The University Hospital in turn, maintained that these allowances were not due. The net result was that Dr Kumar did not testify at these proceedings. The circumstances above were adduced in evidence through an investigating officer, Mohd Shaffry bin Hj Adam, SP16 ('SP16') and one Professor Ikram Shah bin Ismail, the Dean of the Faculty of Medicine, University of Malaya, SP18 ('SP18'). It is evident from their evidence that despite their best efforts, Dr Virendra's presence could not be procured at the trial of this matter.

[28] However s 340 of the Criminal Procedure Code provides as follows:

(1) Where on the trial of any person charged with culpable homicide amounting to murder or culpable homicide not amounting to murder it is proved that the Medical Officer who made the post-mortem examination of the body of the deceased person is dead or is absent from the Federation, it shall be lawful to receive any report of such Medical Officer made under the provisions of this Code as evidence with regard to the appearances of the body when examined by such Medical Officer and as regards the cause of death.

(2) Such evidence shall be subject to such deduction from its weight as the Court or jury deems proper to make by reason of such report not having been made upon oath and the accused person not having any opportunity of cross-examination.

[29] Accordingly the admissibility and weight if any, to be accorded to Dr Virendra's post-mortem report will be considered in the course of this judgment. However the report, exh P42 states that the cause of death was head injuries. An external examination of the body showed that the deceased's entire face was covered with blood stains, his nose and mouth were bleeding and his eyes contused.

The deceased suffered no less than nine abrasion and contusion wounds to the front of his head and neck, eight wounds to the back of his head and neck and three contusion and abrasion injuries to his right shoulder and chest. The report sets out the findings of the doctor on an internal examination of the deceased whereby he noted that the skull of the deceased was fractured. The fracture line was described as follows:

> ... started from the left side roof of the orbit going vertically backwards, crossing the pituitary fossa and entering the right middle cranial fossa. This fracture line further continued in the posterior cranial fossa where it almost encircled the foramen magnum and reached to the pituitary fossa through the left middle cranial fossa. There were subarachnoid haemorrhages over the surface of the right parietal lobe, under the surface of the temporal and frontal lobe and along the cerebellum ...

[30] In other words the fracture of the skull was extensive and affected almost the entirety of the surface of the deceased's head. His other organs and limbs were not affected, and were normal. It is therefore apparent that the greater part of the injuries inflicted on the deceased were in the region of his head, face and neck.

Burden on the prosecution at the close of the prosecution case. Has the prosecution made out a prima facie case punishable under s 302 of the Penal Code against Dulamit and Valiuan, the two accused persons?

[31] In order to ascertain this, the prosecution will have to establish that the ingredients of murder, punishable under s 302 of the Code, have been made out. The ingredients for an offence punishable under s 302 of the Penal Code will therefore first be considered.

INGREDIENTS OF THE OFFENCE

The ingredients of the offence of murder under s 302

[32] Murder is comprehensively defined in the Penal Code under ss 299 and 300. The punishment for murder is set out in s 302. Section 299 provides as follows:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
>
> Section 300 states:
>
> > Except in the cases hereinafter excepted, culpable homicide is murder if the act by which the death is caused is *done with the intention of causing death*, or Secondly — If it is *done with the intention of causing such bodily injury as the offender knows to be likely to cause the death* of the person to whom the harm is caused, or
> >
> > Thirdly — If it is *done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death*, or
> >
> > Fourthly — If the person committing the act *knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death*, or such injury as aforesaid.

[33] In order to establish its case the prosecution therefore has to prove in the instant case involving Dulamit and Valiuan, that:

(i) The death of a human being, namely Lim Chin Kok has taken place;

(ii) That Lim died as a result of the injuries sustained by him;

(iii) That Lim's death was caused by or in consequence of the act/s of Dulamit and Valiuan, the accused persons;

(iv) That the act was done with the common intention of Dulamit and Valiuan:

  (a) to cause the death; *or*

  (b) to cause such bodily injury as they knew to be likely to cause the death; *or*

(c) to cause bodily injury which in the ordinary course of nature is sufficient to cause death; *or*

(d) with the knowledge that their acts were so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and they committed such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Ingredient (i): The death of a human being has taken place

[34] The fact that Lim Chin Kok is dead is established through the evidence of, inter alia, SP1 the cashier who saw Lim lying face down on the ground outside the Goodwell Restaurant on the night of the incident. He also knew Lim from having sighted him in the restaurant during the daytime. SP1 was able to identify Lim from pictures taken during the post-mortem examination.

In similar manner, SP14 and SP17 also identified Lim as the man involved in the brawl on the night of the incident, from the photographs taken during the post-mortem examination. SP12, the investigation officer and SP4 who was called to the scene of the incident, arrested several suspects and stood guard over the area also recalled that Lim was lying face down on the ground and that no discernible movement could be detected from him on that night. SP12 also testified that Lim's elder brother confirmed his identity as borne out by his identity card found in his wallet.

[35] Lim was in fact pronounced dead by the pathologist, Dr Virendra Kumar, who, as is explained above did not testify at this trial. However his post-mortem report establishes Lim's death, and as specified in s 340 of the Criminal Procedure Code such report is prima facie admissible in view of his absence from the country. However the weight to be accorded to it is in the discretion of the court. Learned counsel for Dulamit, Mr Sreekant Pillai, maintained that P42 was of limited applicability in this trial as Dr Virendra Kumar's presence in court was required to confirm the identity of the deceased. He maintained that this was necessary as Lim's National Registration Identity Card was not adduced in evidence and his brother did not give evidence pertaining to his identity. However when the report P42 is considered in conjunction with the photographs of the post-mortem and the evidence of the several witnesses as outlined above, including SP4, SP12, SP1, SP14 and SP17 it would appear that the fact of Lim's death is beyond dispute. Therefore for the purposes of establishing the fact of Lim's death, the report is admissible and weight may be accorded to that part of the report which relates to this fact. As a consequence ingredient (i) is proven.

Ingredient (ii): That Lim died as a result of the injuries sustained by him

[36] Proof of this ingredient is dependent on evidence from a pathologist. In the instant case, as Dr Virendra Kumar did not testify, for reasons beyond the control of the prosecution, it becomes necessary to rely on the post-mortem report which is admissible pursuant to s 340 of the CPC as explained above. What then is the weight to be accorded to such a report, where the maker was not subject to cross-examination?

Mallal's Criminal Procedure, (6th Ed, 2001) states:

> This section provides for the admissibility of the post-mortem report of the deceased person where the medical officer who made such report is either dead or absent from the country. In such event, the weight of such report is subject to any deduction the court may deem fit and proper to make by reason of such report not having been made on oath and the accused person not having an opportunity of cross-examination.

[37] Both counsel for Dulamit and Valiuan contended that in the absence of the pathologist, it was not possible to cross-examine him to ascertain whether the 'head injuries' which he said was the cause of death, could be attributed to the flower pot that was swung and hurled in the direction of Lim's head and neck, or whether such injuries were caused by the chairs that were used to hit Lim, or whether such head injuries were in fact caused when he fell to the floor.

With great respect to counsel for the accused persons, these contentions that they raise relate primarily to the issue of whether the acts of the accused persons caused the injuries sustained by Lim, rather than whether Lim died as a consequence of the injuries sustained by him. The post-mortem report does not purport to surmise or attribute liability or culpability to any of the accused persons or any other party for the injuries suffered by Lim.

[38] Instead the post-mortem report affords an almost contemporaneous record of the injuries suffered by Lim. On the basis of such injuries, and his expertise in the field, the pathologist then postulates the cause of Lim's death. Here, Lim's death is stated to have been caused by head injuries. However the term 'head injuries' is discussed in some depth in the post-mortem report as cited above. Dr Virendra Kumar found, on examination of the deceased, that he had suffered an extensive and grave fracture which had the effect of seriously injuring significant parts of his brain, and causing internal haemorrhage in the brain. The fact that Dr Virendra Kumar was not present to be cross-examined on his description of the extent and nature of the fracture of Lim's skull and the haemorrhaging described in his report, does not and cannot detract from the fact that these were his observations during

the course of the post-mortem examination which were contemporaneously recorded. In other words, his availability as a witness would not have altered his observations noted in his report. His presence would have assisted in explaining more precisely the meaning and effect of such injuries. As such, weight can be accorded to the observations of the injuries suffered by Lim. Weight may also be accorded to the fact that he died as a consequence of those head injuries, namely the extensive fracture and haemorrhaging, because such a conclusion is based upon his knowledge as a medical expert and his observations of the injuries suffered by the deceased, which he recorded simultaneously. His report has no bearing on whether the injuries were caused by the actions of Dulamit or Valiuan.

Accordingly ingredient (ii) namely that Lim died as a consequence of the injuries he sustained is made out.

Ingredient (iii): Lim's death was caused by or in consequence of the act/s of Dulamit and Valiuan, the accused persons

[39] In support of this ingredient the prosecution relied primarily on the evidence of SP14 who was present at the scene of the incident in the early morning hours of 30 July 2004. The relevant portions of his evidence during examination-in-chief and cross-examination are as follows:

> ... A: Masa kami balik ke rumah Dulamit, lelaki Cina datang. Saya tak kenal lelaki Cina itu. Ia adalah lelaki Cina yang sama yang menjual CD tadi. Dia datang minta duit. Dulamit kata kami semua sudah kehabisan duit. Kemudian Cina itu naik marah. Kami terus naik rumah. Kami tidak bagi duit. Dia seorang sahaja mengekori kami dan marah dan bercakap percakapan maki.
>
> Dia bawa satu botol jenis stout. Kemudian dia membaling ke arah kami berempat. Botol itu kena Dulamit. Kena bahagian tangan. Ada luka di bahagian lengan. Luka yang besar juga. Kalau dijahit mungkin dua jahitan.
>
> Lepas itu Dulamit marah. Dia cakap 'apa ini Cina, kurang ajar'. Dia cakap dengan kuat dalam keadaan marah. Masa itu lelaki Cina mengambil botol lagi untuk membaling. Dulamit turun untuk mengejar lelaki Cina ...
>
> Q: Lepas itu?
>
> A: Dulamit turun dan kejar lelaki Cina itu. Lelaki Cina sampai di bawah, di kaki lima rumah kedai, Cina itu bergaduh dengan Dulamit. Masa itu saya ada di anak tangga bahagian bawah. Saya lihat pergaduhan.
>
> Q: Masa itu, mana Valiuan?
>
> A: Dia berada di sebelah saya.
>
> Q: Seorang lagi?
>
> A: Dia di tingkat 1, di belakang saya. Dia di tengah tangga.
>
> Q: Dulamit dan Cina bergaduh bagaimana?

A: Bergaduh macam bertumbuk. Mereka tidak pakai senjata. Lelaki Cina tidak menggunakan pisau dan senjata lain. Dua-dua tangannya kosong.

Q: Ada orang lain terlibat?

A: Dia tendang lelaki Cina itu, pakai kakinya. Valiuan tendang bahagian bahu lelaki Cina. Dia jatuh ke tanah. Dia tendang di bahagian lengan. Lepas itu Cina bangun balik dan lawan balik. Dia terajang/tendang Valiuan dan lawan balik dengan Valiuan. Kemudian orang Cina dari kedai makan 24 jam semua datang. Lepas itu satu orang Cina cakap 'Sudah, Sudah'.

Lepas itu Valiuan masih pukul lelaki Cina itu pakai kerusi. Kerusi itu dia ambil daripada restoran. Kerusi berwarna putih. Valiuan pukul dengan kuat. Kerusi ada patah. Dia pukul di bahagian *bawah dari leher*. Masa itu Dulamit berdiri. Lepas itu apabila pukul lelaki Cina tersebut terus balik, ke rumah ...

Q: Balik kepada kejadian. Kamu kata Valiuan telah menggunakan kerusi sampai patah. Bagaimana dengan Dulamit?

A: Selepas Valiuan pukul menggunakan kerusi, lelaki Cina itu jatuh. Lelaki Cina itu mengata perkataan maki, perkataan tidak baik kepada Dulamit. Lepas itu Dulamit marah. Dia membaling gelas kepada lelaki Cina, tapi tak kena. Lepas itu Dulamit jatuhkan pasu bunga dan menghentak ke atas lelaki Cina di bahagian kepala.

Q: Macam mana dia angkat?

A: Dia pakai dua tangan.

(Witness shows how Dulamit takes a flower pot and hurls it at the victim).

Mula-mula lelaki Cina, dia jatuh terduduk selepas di pukul dengan kerusi oleh Valiuan.

Q: Lepas itu dia maki Dulamit?

A: Ya.

Q: Masa dia cakap, dia masih dalam keadaan terduduk?

A: Ya.

Q: Apa perkataan yang diguna?

A:'Lu kongket dengan lu punya ma' dan banyak lagi seperti 'cabal', 'lancau'.

Q: Selepas itu?

A: Dulamit ambil pasu bunga yang berada di tepi tiang di kawasan itu. Dulamit pegang bunga yang diangkat sekali dengan pasu. Kemudian dia hayun kena kepada kawasan kepala di leher. Pasu bunga ada kena pada leher orang Cina. Dia hayun dan lepas pasu bunga. Pasu itu jatuh dan pecah.

Q: Ada nampak cedera/luka?

A: Dia terhayun pasu, kami naik. Saya tak tengok lelaki Cina. Dia belum jatuh tertiarap. Dia dalam keadaan sujud. Kepalanya (on all fours facing downwards) menghala ke bawah. Saya tak nampak dia jatuh. Saya tak dengar apa-apa perkataan dari dia ...

[40] SP14 went on to testify that the chair, flower pot and glasses utilised during the course of the fight had been taken from the restaurant. He maintained that he was about ten to twenty feet away from the fight when Dulamit hurled the flower pot at Lim's head and neck.

When SP14 was asked whether he had participated in the fight, he stated that he had tried to separate Dulamit and Lim during the incident at the beginning, but failed to succeed. He also explained that other persons in the restaurant came and tried to stop the fight and separate them but also failed. SP14 testified that he became angry with these other customers from the restaurant and had a verbal argument with them during the incident. He agreed that all of them had drunk a great deal that night and were drunk.

[41] In the course of cross-examination, SP14 confirmed that he had drunk a great deal that night. Collectively, SP14, Dulamit, Valiuan and the fourth person had drunk between them about thirty-eight bottles of beer and stout that night from about 8pm until the time of the incident at about 2am. SP14 went on to reconfirm the details of the evidence he had given in the course of examination-in chief. He denied again that he had participated in hitting or beating Lim. He admitted the verbal argument with the Chinese customers during the course of the fight which he said took about fifteen minutes. He did agree with the defence proposition that in his condition he heard what happened but did not see what actually happened. He also agreed that as this matter happened a long time ago and he was drunk, there were gaps in his recollection of the events of that night.

In re-examination, he confirmed that he saw Valiuan hitting Lim with a chair and Dulamit hurling the flower pot at Lim while he was engaged in a verbal quarrel with the other Chinese customers of the restaurant. He also maintained, despite his statements in cross-examination that he saw all that he described in the course of his earlier testimony. He also confirmed that he had started climbing up the stairs when he saw Valiuan hit Lim with the chair followed subsequently by Dulamit hurling the pot at him.

[42] Taken in toto, SP14's evidence was consistent. While he agreed that there were gaps in his memory and that in his condition he had heard but not seen what precisely happened, this portion of his testimony could not detract from the details enunciated during examination-in-chief and in re-examination as to the manner in which the fight began and progressed culminating in Lim being left on all fours with his head facing downwards, when they left him. The witness was able to demonstrate the precise position adopted by Lim. He was also able to testify as to which portions of the body were injured and the identity of the assailant in some detail. Finally in deciding on the veracity of the evidence of this witness, I also considered whether he might be testifying so as to preclude himself from being culpable

or involved in Lim's death. I was however satisfied from his ready answers, his demeanour and the details in his replies that his recollection was honest. It was also not put to SP14 that Dulamit and Valiuan were not involved in the fight or that they did not beat him with a plastic chair or a flower pot. In these circumstances his evidence could be relied to ascertain the chronology and events of that night.

[43] The direct evidence of SP14 was corroborated, inter alia, by that of SP6 and the report of the pathologist, exh P42. SP6, the chemist testified that Lim's blood was found on Dulamit's underwear and on Dulamit's slippers as set out above. From this it can be gleaned that Lim bled, and some of his blood ended up on Dulamit's underwear and slippers. When considered in the context of SP14's evidence it corroborates his version of both of them being involved in a fierce physical fight. Moreover Lim's blood was found on the glass fragments and pieces of the broken plastic chair that were found in the vicinity of Lim's head, after the incident. This again shows that Lim was hit with these objects, which also corroborates SP14's version of events.

[44] The report of the pathologist, exh P42 which is admissible in evidence as a consequence of s 340 of the CPC, despite the absence of the pathologist, also corroborates that portion of SP14's evidence relating to how Lim was hit on the head by a flower pot hurled by Dulamit. It does so in that the post-mortem examination revealed serious fractures of the skull. In this context, I am reminded of the provisions of s 340(2) which expressly provides that the pathologist's evidence is subject to such deduction from its weight as the court deems proper, by reason of such report not having been made upon oath, and the accused person not having any opportunity of cross-examination. However s 340(1) makes lawful the admission of such a report in relation to the appearances of the body as well as the cause of death, provided that it is proved that the officer who made the post-mortem examination of the body is, inter alia, absent from the country. As has been borne out by the evidence of SP17, the fact of Dr Virendra Kumar's absence from Malaysia and the reasons for his refusing to return to testify at this trial despite being repeatedly sought to do so by the prosecution and his previous employers, has been adequately made out. As a consequence, his report, exh P42 becomes admissible in evidence.

[45] What is the net effect of it being admissible in evidence? It can only mean that the contents of the report may be read and utilised for the purposes of adjudicating on this matter. It would be perverse to construe the section such that the document in question becomes admissible, but that it cannot be used or relied upon for the adjudication of points arising at trial. The legislative purpose and intent would be undermined if such an approach were adopted. It therefore appears that the section allows for the receipt,

admission, use and reliance of the document, but with the court exercising care and discretion to ensure that it is not simply accepted in toto, but that sufficient deductions are made, taking into consideration the fact that the maker could not be cross-examined.

[46] What does this mean in the context of the present case? What deductions, if any should be made? The post-mortem report describes the injuries suffered by Lim which is corroborated by the evidence of SP1, SP14, SP4 and SP12. They all described serious injuries to the region of Lim's head, not the rest of his body. The report goes on to surmise from an internal examination of Lim's head that as a consequence of the grave fracture of the skull which he sustained (as has been described above) the cause of death was head injuries. The evidence of SP12 was that the weight of the flower pot which SP14 testified was hurled against Lim's head was no less than 28 pounds. When this evidence is viewed cumulatively with the rest of the evidence pertaining to Lim's injuries, the fact that he sustained serious fractures of his skull as a consequence of being hit with a 28 pound flower pot appear to be credible.

[47] It was contended by the defence that the cause of death cited by the pathologist had to be treated with caution, because it was not clear, in the absence of cross-examination, whether the head injuries could have been caused by, for example, Lim falling on the floor and hitting his head. This contention lacks basis for several reasons:

(i) Lim did not fall from a great height. In fact, SP14's testimony shows how he eventually fell into a sitting position on being hit with a chair, and then with the flower pot, before falling onto all fours, before finally collapsing face downwards onto the ground. Therefore a fracture of the skull is wholly unlikely to have been caused by a fall from his knees to the ground;

(ii) The fact that Lim was hit with a 28 pound pot in the region of his head is consistent with the fact of a fractured skull. For this reason, I read and utilised the contents of the post-mortem report. It must be noted however, that if not for the rest of the clear corroborative evidence relating to the injuries suffered by Lim, I would not have readily accepted the contents of the report. In other words, if the post-mortem report provided the sole document establishing the cause of death, it would not have been so utilised. In the circumstances of this case, the inclusion of the contents of the report pertaining to Lim's appearance and the cause of death appeared to be proper.

[48] SP14's evidence is also corroborated by those witnesses who arrived after the occurrence of the incident when they described finding Lim

sprawled face downwards on the ground with broken fragments of glass, broken bits of a plastic chair and of a flower pot near and around him, in the region of his head. Such was the evidence of SP1, SP4 and SP12.

[49] Finally SP1 also gave evidence of the physical fight between Lim and, inter alia, Dulamit and Valiuan. However his evidence differed from that of SP14 in that he testified that four men had hit and beaten Lim. He stated that Lim had been beaten in the region of his head by all four men utilising broken bottles. He could not recollect the specific roles of Dulamit and Valiuan. Nor did he testify as to the use of a flower pot or plastic chair. He confirmed however that the fight was started by Lim, although he could not say how, and that the fight took about ten minutes.

[50] Counsel for the defence contended that SP1's evidence differed from that of SP14 and in the face of what were termed 'material contradictions' there was no clear evidence as to the events of that night, as it was not clear whether all four men had beaten Lim or whether it was Dulamit and Valiuan who had been engaged in the fight as testified by SP14.

SP14 had testified that he was not involved, but that he had attempted to separate Dulamit and Lim when the fight began. This would explain his being 'involved'. Moreover, as established both in examination-in-chief and particularly in cross-examination, SP14 maintained that he had been involved in a verbal argument with other Chinese customers.

[51] On a consideration of the totality of the evidence, it would appear that SP14's evidence which was meticulous in its detail is to be preferred to that of SP1 who gave a very general description of the events of that night. Moreover it must be borne in mind that SP1 did not in any manner exonerate Dulamit and Valiuan from being involved in the fight. He included the other two men who were present. Accordingly his evidence does not contradict SP14's evidence of a fierce physical fight between Dulamit, Valiuan and Lim. It appears to throw doubt on whether Dulamit and Valiuan can be convicted for an offence purportedly carried out by four men. However as stated earlier, in the face of the clear and detailed evidence of SP14 as borne out by SP6 and the post-mortem report, it is concluded that Lim's death was caused by or in consequence of the act/s of Dulamit and to a lesser extent, if at all, by Valiuan. This is because the cause of death is injuries to the head, whereas Valiuan did not attack or hit Lim on his head. The extent of Valiuan's culpability will depend to a considerable extent on the next ingredient, namely whether Dulamit and Valiuan with common intention intended to cause the death of Lim.

Ingredient (iv): That the act was done with the common intention of Dulamit and Valiuan to cause the death: or to cause such bodily injury as they knew to be likely to cause the death; or to cause bodily injury which in the ordinary course of nature is sufficient to cause death, or with the knowledge that their acts were so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and they committed such act without any excuse for incurring the risk of causing death or such injury as aforesaid

[52] Section 34 of the Penal Code which deals with common intention serves to 'lay down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention.'... Dhirajlal and Ratanlal, *Law of Crimes* 3rd Ed, chapter II at p 101.

[53] And at p 105:

> ... Common intention implies acting in concert, *existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts*. This section embodies a principle of joint liability in the doing of a criminal act and the essence of that liability is the existence of a common intention. It is well-settled that common intention in this section presupposes prior concert. It requires a pre-arranged plan because before man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Accordingly there must have been prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and declaration made by them just before mounting the attack. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly. But there must be pre-arrangement and premeditated concert. It is not enough, to have the same intention independently of each other ...

[54] Was there a common intention on the part of Dulamit and Valiuan in the instant case to cause the death of Lim? This requires a consideration of the totality of the evidence to ascertain whether the two accused persons had a common intention to commit the offence. In the instant case, there is no evidence to suggest the existence of any form of preconceived plan to act in concert to cause Lim's death. Dulamit and Valiuan were out for the night having a drink when Lim interrupted their gathering and insulted them, and subsequently as they were leaving followed them and threw a bottle which injured Dulamit on his arm. At no point during this time could it be said that they had developed any prior plan or decision to act in concert so as to commit an offence against Lim.

[55] However in *Namasiyiam & Ors v Public Prosecutor* [1987] 2 MLJ 336, the Federal Court held that common intention could arise spontaneously in the course of an incident:

> ... Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused (The Supreme Court (of India) on Criminal Law 1950–1960 by JK Soonavala at pp 188–193).

[56] Even if a pre-arranged plan or an act in concert may develop on the spot during the course of the commission of the offence, the crucial factor is that such plan or concerted action must precede the act constituting the offence. In the instant case, can it be inferred from the acts or conduct of the two accused persons, prior to Dulamit hurling the flower pot at Lim, or Valiuan hitting him with a plastic chair that they had decided to act in concert? Can it be said that simply because Valiuan joined in the physical fight between Dulamit and Lim that they had a preconceived plan or common intention to injure him so as to cause his death? The answer is in the negative. The facts and circumstances of the instant case point to a sudden fight, initiated by Lim, and in the course of which physical injuries were exchanged between Dulamit and Lim as well as Valiuan and Lim, separately. This culminated in Lim collapsing and sustaining a fractured skull when Dulamit hit him with the base of a flower pot. Prior to this Valiuan had hit him with a plastic chair but on the area beneath his head, ie on his body, until the chair broke. There is no overt act or statement from which the court can conclude that there existed a common intention prior to the infliction of the respective injuries. In the circumstances it cannot be said that there was a common intention on the part of Dulamit and Valiuan to cause the death of the accused. As there was no common intention between Dulamit and Valiuan, the acts of the two accused persons in relation to their infliction of injury on Lim, has to be considered separately.

[57] It falls to be considered firstly, whether Dulamit, who delivered the fatal blow to Lim's head, resulting in the serious fractures to the skull which caused his death, possessed the intention to cause death under limbs (1), (2), (3) or (4) of s 300, as contended by the prosecution. In *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 Raja Azlan Shah FJ (as His Royal Highness then was) explained the distinction between the provisions of ss 299 and 300 of the Penal Code. This is what he said:

> Section 299 of the Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that the act is likely to cause death.

A Section 300 of the Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of the person to whom the harm is caused; (3) with the intention of causing such
B bodily injury to any person, and ... i*s sufficient in the ordinary course of nature to cause death*; (4) with the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death.

The words which I have italised show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always
C murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. *Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder*. Illustration (d) of s 300, Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special
D circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s 300 of the Penal Code is a good example. The essence of (b) and (3) is this. *It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death*. Illustration (c) given in s 300 of the Penal
E Code is an example. It is on a comparison of these two limbs of s 299 and s 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of ss 299 and 300 is the
F tenuous contention that s 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions of s 300 apply, and if by reason of the absence of the necessary degree of mens rea an offence does not fall within s 300, it cannot be one of culpable homicide. *Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 of the Penal*
G *Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in s 300 of the Penal Code*. We would like in this connection to express the need to bear in mind that all cases falling within s 300 of the Penal Code must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300. The first part of s 304 of
H the Penal Code covers cases which by reason of the exceptions are taken out of the purview of s 300 cll (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of s 29, but not within s 300, cll (2) and (3). The second part of s 304 of the Penal Code covers cases falling within the third part of s 299 not falling within s 300, cl (4).

I

[58] Here the prosecution contended that limb (3) or (c) of s 300 had been satisfied in that Dulamit executed the fatal blow with the intention of causing bodily injury to Lim and the bodily injury was sufficient in the ordinary course of nature to cause death. While it can be deduced from Dulamit's

conduct in continuing to hit Lim that he intended to cause bodily, injury, there is however no evidence to establish that the injury effected by Dulamit, namely the injury to Lim's head was sufficient in the ordinary course of nature to cause death. This is usually provided by the pathologist who would be able to assess whether such a blow is sufficient to cause death, in the ordinary course of nature.

In the absence of such evidence it falls upon the court to look at the facts and the conduct of Dulamit to ascertain his intention. The chronology of events shows that Lim was initially attacked by Dulamit, followed by Valiuan with a plastic chair. It is in evidence that broken bottles and glasses were also utilised by each of them. However Dulamit followed this by picking up a flower pot weighing more than 28 pounds and hurling it at Lim's head. From this it can be concluded that Dulamit clearly intended to cause severe bodily injury to Lim. *The act of directing the base of the pot at his head warrants the conclusion that he was intent on causing such bodily injury as is likely to cause death. It is not possible however to conclude with any degree of certainty, particularly in the absence of expert medical evidence, that the injuries inflicted by Dulamit must in all probability have caused Lim's death*. The facts of this case therefore appear to fall within the lesser offence of culpable homicide not amounting to murder falling within the first part of s 304 of the Penal Code.

[59] Next, the intention or mens rea of Valiuan falls to be assessed on a consideration of the totality of the circumstances. As concluded above, there is insufficient evidence to warrant a finding of common intention between Dulamit and Valiuan, in furtherance of which they committed a crime. As detailed above, Valiuan's part in the commission of injury to Lim was subsidiary to that of Dulamit. His beating of Lim was on portions of Lim's body below his head. He utilised a white plastic chair to hit Lim which broke into pieces. Valiuan also came in to assist Dulamit after the physical fight between them had commenced. Given the use of a plastic chair and the fact that Valiuan utilised it on the lower parts of Lim's body, it cannot be concluded that he hit him with the intention of causing such bodily injury as was likely to result in death. From his conduct it can be inferred that he intended to cause grievous bodily hurt to Lim. This can be gleaned from the fact that he continued to hit Lim until the chair broke and Lim fell into a sitting position. Lim was already injured by their use of broken glass bottles and glasses, yet Valiuan saw fit to continue to hit Lim. Therefore his acts make him culpable under s 325 of the Penal Code.

[60] In these circumstances, I conclude that the prosecution has made out a prima facie case under the *first limb of s 304 of the Penal Code* against Dulamit *and under s 325 of the Penal Code* against Valiuan. They are therefore called upon to enter defence in respect of the charges made against each of them individually as follows:

[61] Charge against Dulamit at the close of the prosecution case:

> That you, Dulamit bin Sulaiman on 30 July 2004, at about 2.30am in front of the Restoran Goodwell, No 47, Jalan PU 2/1, Puchong Utama, Puchong, in the district of Petaling, in Selangor Darul Ehsan, did commit culpable homicide by causing the death of Lim Chin Kok, and as such you have committed an offence that is punishable under limb one, section 304, Penal Code.

[62] Charge against Valiuan at the close of the prosecution case:

> That you, Valiuan bin Mantok, on 30 July 2004, at about 2.30am in front of the Restoran Goodwell, No 47, Jalan PU 2/1, Puchong Utama, Puchong, in the district of Petaling, in Selangor Darul Ehsan, did commit grievous bodily harm by inflicting injury on Lim Chin Kok, and as such you have committed an offence that is punishable under section 325, Penal Code.

[63] Upon pronouncement of the court's decision above, Valiuan decided, after consultation with his counsel to plead guilty. The amended charge was read out to him and he pleaded guilty, fully comprehending the contents of the charge and having understood the consequences of his plea. Dulamit sought a short adjournment to consider his plea.

SENTENCE FOR VALIUAN

[64] In deciding on an appropriate sentence for Valiuan, I considered the facts of the case and the plea in mitigation, bearing in mind the statutory ambit within which a sentence may be imposed under s 325 of the Penal Code. In determining an appropriate sentence, the overriding principle which I had at the foremost of my mind was public interest. I was guided by one of my earlier decisions in *Pendakwa Raya v Sangkaw a/l Ratnam* [2007] 7 MLJ 353:

> Public interest in the context of an offence of this nature and the nation today, in the twenty-first century, is to eradicate or at the very least reduce incidents of violence resulting in death. Such incidents, which arise albeit as a consequence of a quarrel, revenge or loss of temper or in furtherance of a crime have become a distinct and present danger that is all pervasive. It has become a serious, if not the single most serious concern of the citizens of the nation, who cry out on a daily basis to the law enforcement authorities and ultimately the courts to redeem the situation. Therefore the courts must reflect the revulsion with which such brutal and violent episodes are viewed, by imposing sentences which are deterrent in nature, but which also fulfill the other twin purposes of sentencing, namely reformation and retribution. The punishment should be 'deterrent' in that sentences imposed should have the effect of daunting the perpetrator, no matter what his age, from ever repeating such violence or even contemplating violence

again. It should also be 'reformatory' in nature in the sense of rehabilitating the offender so as to induce him to loathe violence.

[65] As against this I considered the plea in mitigation and the facts surrounding this unfortunate episode. A significant mitigating factor is that in this case, the deceased repeatedly provoked the second accused and Dulamit, by using highly abusive language, following them and demanding for money and finally throwing a glass bottle in their direction, resulting in injury to Dulamit. However the violent response of the second accused was not commensurate with the level of provocation afforded by the deceased, Lim. I also took into account that as a consequence of this episode a life was lost, quite uselessly.

[66] Having considered these factors, I concluded that the appropriate sentence to be passed on the second accused, Valiuan, was a term of imprisonment of six years to commence from the date of his arrest, and I so order.

SENTENCE FOR DULAMIT

[67] In like manner, when considering the appropriate sentence to be handed down in respect of Dulamit, I considered the public interest to be of primary significance. As I stated in an earlier decision on sentencing in *Public Prosecutor v Tegoh bin Aling* [2008] 8 MLJ 705:

> Section 304(a) of the Penal Code prescribes the statutory ambit for the punishment of culpable homicide not amounting to murder where 'the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death'. It provides for the punishment of imprisonment for a term which may extend to twenty years and/or a fine. The discretion to be exercised in arriving at a sentence must be judicially exercised in accordance with established principles. However, there are many different circumstances giving rise to this offence that fall within this definition. It is a generic name for a group of offences perpetrated under dissimilar conditions. As a consequence the punishment for such offences which are committed under widely differing circumstances, yet which fall within such a generic definition, are correspondingly varied. In *R v Cascoe* [1970] 2 All ER 833 Salmon LJ wrote with regards to the offence of manslaughter which is encapsulated, inter alia, by s 304(a) of the PC: 'As for sentence, manslaughter is, of course, a crime which varies very, very greatly in its seriousness. It may sometimes come very close to inadvertence. That is one end of the scale. At the other end of the scale, it may sometimes come very close to murder'.

[68] Such a diverse breadth of circumstances requires an equally broad discretion to be accorded to a court on sentencing for the commission of such

an offence. As the degree of culpability of the accused in an offence of this nature will vary considerably with the circumstances giving rise to the commission of the offence, the sole common ingredient being death, reliance on case-law or the formulation of rigid guidelines is less than useful to a sentencing court. There is no 'typical case' that affords a starting point for the purposes of imposing a sentence.

> However the frequency with which this crime occurs has not abated over time despite the imposition of relatively long sentences of imprisonment.
>
> If at all, the incidence and circumstances giving rise to this offence have increased both in numbers and the manner of commission of the offence. This, to my mind, required emphasis to be placed on general deterrence in an effort to provide a greater measure of security for society. Public interest requires the administration of justice to enforce the criminal law by imposing sentences that are proportionate to the nature of the crime committed, while avoiding disparity in sentencing.

[69] In this particular case, the culpability of the accused's actions and the extent of violence and brutality that he perpetrated on the deceased were the paramount factors that determined the appropriate range of sentence. As against this, his background, his prospects for rehabilitation and his remorse were taken into account. It cannot be denied that the provocation afforded by the deceased was of the highest degree. The issue is whether the provocation was sufficient to deprive a reasonable man of his self-control and whether the means the accused used to retaliate were reasonable in view of the provocation offered.

> In the instant case it has to be emphasised that notwithstanding the level of provocation afforded by Lim, Dulamit reacted wholly disproportionately to the provocation received. His brutal and violent response to Lim's physical and verbal abuse was excessive. His act of striking Lim on the head with the heavy earth-filled flower pot resulted in a fracture of the skull which was extensive and affected almost the entirety of the surface of the deceased's head essentially splitting his skull into two.

It is evident that Lim could not have defended himself from the impact of this blow. The attack on Lim was both prolonged and violent. Therefore the extent to which the provocation serves to mitigate the accused's conduct is limited.

As against the public interest, the other mitigating factors relating to the accused were next considered.

FIRST OFFENDER

[70] Dulamit had no previous convictions and is a first time offender. It is

an established practice to give some consideration to the fact that the accused is a first time offender, although the extent to which this can be done in a serious offence is limited. Notwithstanding the gravity of this offence, this was a mitigating factor in the instant case.

PLEA OF GUILT

[71] The accused pleaded guilty as soon as he could upon an alternative charge being read out to him. It was argued for the prosecution that the plea of guilt should not afford the accused any credit or discount on the sentence to be imposed, in view of the gravity of the offence and as the accused's reaction to the provocation was far in excess of a proportionate response to the provocation received. It is indeed true that a plea of guilt does not automatically entitle an accused as of right to a discount on the sentence to be imposed. However, the facts of this case do not show that the accused set out with the intention to cause any form of injury to the deceased that evening. There was no premeditation to cause bodily injury. The accused's failure was in reacting disproportionately to the physical and verbal abuse of the deceased. All in all, the plea of guilt in the instant case therefore, should be accorded some consideration when considered in the entirety of the circumstances.

COMPARISON OF SENTENCES IN OTHER CASES FOR A SIMILAR OFFENCE

[72] In the instant case, I took into account public interest, the culpability of the accused's actions and the extent of the violence and brutality that was present in the circumstances of the case. I also took into further consideration the remorse expressed by the accused, the provocation afforded to him and his plea of guilt at the earliest possible opportunity available to him. Having done so, the sentence that was handed down was a term of imprisonment of nine years, to take effect from the date of his arrest.

First and second accused convicted and sentenced to nine years and six years of imprisonment respectively.

Reported by Kohila Nesan